Public Prosecutor v Zainal bin Ismail & Ors

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-06B–12 OF 2006
GOPAL SRI RAM, HELILIAH AND SULONG MATJERAIE JJCA
5 FEBRUARY 2009

Criminal Law — Corruption — Corruptly receiving gratification — Appeal against conviction and sentence allowed — Public prosecutor's appeal — Whether sessions court judge failed to evaluate evidence properly — Whether sessions court judge misdirected herself by acting upon evidence which required corroboration — Whether prosecution ought to have invoked s 34 of the Penal Code against respondents — Prevention of Corruption Act 1961

Evidence — Witness — Credibility of — Whether witnesses were accomplices — Whether evidence was corroborated

On 26 November 1997 when one Mageswaran ('M'), a lorry driver, arrived at the Customs Complex at Tanjong Puteri Johor Bahru ('the complex'), he was accosted by the three respondents who alleged that the lorry was carrying dutiable goods that had not been declared. According to M, the respondents had then demanded a sum of RM3,000 from M to overlook the non-declaration. At this point, M allegedly informed the respondents that he did not have the money and that the goods in the lorry belonged to one Mohamad Azni bin Abdul Ghani ('Azni'), whom M then contacted on his phone. Azni alleged that when he arrived at the complex, the three respondents had demanded a sum of RM10,000 from him but that he had paid only RM3,000 and assured them that he would raise the remainder of the money the following day. He also claimed that the respondents had taken possession of his identity card as security to enforce his promise. The next day Azni had reported the matter to the Anti-Corruption Agency ('ACA') at Johor Bahru and while Azni was at the Agency he had received two calls on his mobile from the respondents. In fact, one of the calls demanding the balance sum of RM7,000 was overheard by an ACA officer. At the next meeting that took place between Azni and the first and second respondents and another ACA officer, Azni handed over a marked RM1,000 note to the first respondent. Just then the third respondent had appeared and expressed dissatisfaction. At this point a pre-arranged signal had been given to alert the other ACA officers waiting in ambush to arrest the first and second respondents, while the third respondent had surrendered himself to the ACA later. The three respondents were charged with offences under the Prevention of Corruption Act 1961 ('the Act'). Based on the evidence adduced by the prosecution, the sessions court judge convicted

the three respondents on all the four charges, which included the first charge of having solicited the sum of RM3,000 from M, the second charge of having solicited a sum of RM10,000 from Azni, a third charge of receiving a bribe of RM3,000 from Azni for not taking action against him for his failure to declare dutiable goods upon their entry into Malaysia and the fourth charge of receiving gratification of RM1,000 from Azni for the same consideration as in the third charge, and sentenced them accordingly. The respondents appealed to the High Court which allowed the appeal because it considered that there had not been a proper evaluation of the evidence of M and Azni, and thus reversed the convictions entered against the respondents by the sessions court. The High Court found M and Azni to be accomplices and therefore held that the sessions court had misdirected itself in acting upon their testimony in the absence of any credible corroboration. This was the public prosecutor's appeal against that decision.

Held, allowing the appeal:

(1) The acts and conduct of M taken as a whole did not render him an accomplice. He was a driver of the lorry in which the goods were carried and thus a mere observer whose only role in the whole incident was the fact that a demand had been made of him, which he promptly conveyed to Azni. Further, M did not participate in any offence, and his evidence did not fall within that class of persons who are at best not reliable witnesses and whose evidence calls for corroboration. In the circumstances the sessions court judge was entitled to act upon his evidence without requiring any corroboration (see paras 7–8).

(2) Azni's evidence that his IC was seized and threats were made against his family while he was raising the first payment of RM3,000, proved that he was acting under duress. It is settled law that a witness who participated in an offence under duress ought not to be treated as an accomplice. As such Azni's evidence did not require corroboration. In any case, if it did, then Azni's evidence was sufficiently corroborated. The evidence of M, the evidence of the ACA officer who overheard the telephone call from the respondents at the ACA demanding the payment of the remainder of the RM10,000 and the evidence of the other ACA officer who saw Azni handing over the marked RM1,000 note to the first respondent was ample corroborative evidence. The presence of the first and second respondents at the post office also confirmed the pre-arranged plan between the respondents and Azni to meet them there. The evidence as a whole at the close of the whole case proved the four charges against the respondents beyond a reasonable doubt (see paras 9–12).

[Bahasa Malaysia summary

Pada 26 November 1997 apabila Mageswaran ('M'), seorang pemandu lori, tiba di kompleks kastam di Tanjong Puteri Johor Bahru ('kompleks tersebut'),

dia telah dihampiri ketiga-tiga responden yang mendakwa bahawa lori tersebut membawa barang-barang berduti yang tidak diisytiharkan. Mengikut M, responden-responden telah kemudiannya meminta jumlah RM3,000 daripada M untuk tidak mengambil perhatian terhadap barangan yang tidak diisytiharkan tersebut. Pada poin ini, M memberitahu responden-responden bahawa dia tidak mempunyai wang dan bahawa barang-barang di dalam lori tersebut adalah kepunyaan Mohamad Azni bin Abdul Ghani ('Azni'), yang mana M kemudiannya hubungi dengan telefonnya. Azni mendakwa bahawa apabila dia sampai di kompleks, ketiga-tiga responden telah meminta jumlah RM10,000 daripadanya tetapi dia hanya membayar RM3,000 dan memberi jaminan kepada mereka bahawa dia akan mengumpul baki wang tersebut pada hari berikutnya. Dia juga berhujah bahawa responden-responden telah merampas kad pengenalannya sebagai sekuriti bagi jaminannya. Pada keesokan harinya Azni membuat laporan tentang perkara tersebut kepada Badan Pencegah Rasuah ('BPR') di Johor Bahru dan sementara Azni berada di Badan tersebut, dia telah menerima dua panggilan di telefon bimbitnya daripada responden-responden. Tambahan pula, seorang pengawai BPR terdengar salah satu panggilan meminta baki jumlah RM7,000 tersebut. Pada perjumpaan berikutnya, Azni menyerahkan nota RM1,000 yang ditanda kepada responden pertama. Sejurus itu, responden ketiga muncul dan menunjukkan perasaan tidak puas hati. Pada poin ini, isyarat yang diaturkan sebelumnya telah diberikan untuk memberi amaran kepada pegawai-pegawai BPR lain yang sedang menunggu untuk serang hendap dan menangkap responden pertama dan kedua, manakala responden ketiga telah menyerah diri kepada BPR kemudiannya. Ketiga-tiga responden telah dituduh dengan kesalahan di bawah Akta Pencegahan Rasuah 1961 ('Akta'). Berdasarkan keterangan yang dikemukakan oleh pihak pendakwaan, hakim mahkamah sesyen telah mensabitkan ketiga-tiga responden atas keempat-empat tuduhan, yang termasuk tuduhan pertama meminta jumlah RM3,000 daripada M, tuduhan kedua meminta jumlah RM10,000 daripada Azni, tuduhan ketiga menerima rasuah sebanyak RM3,000 daripada Azni supaya tindakan tidak diambil terhadapnya kerana kegagalan untuk mengisytiharkan barang-barang berduti setelah ia memasuki Malaysia dan tuduhan keempat menerima suapan sebanyak RM1,000 daripada Azni untuk pertimbangan yang sama seperti dalam tuduhan ketiga dan mengenakan hukuman sewajarnya. Responden-responden merayu ke Mahkamah Tinggi yang telah membenarkan rayuan oleh kerana ia mempertimbangkan bahawa tidak terdapat penilaian yang sepatutnya terhadap keterangan M dan Azni dan justeru mengakas sabitan-sabitan yang dimasukkan terhadap responden-responden oleh mahkamah sesyen. Mahkamah Tinggi mendapati M dan Azni adalah rakan subahat dan oleh itu memutuskan bahawa mahkamah sesyen telah tersalah arah dengan mengambil tindakan berdasarkan kenyataan mereka dalam ketiadaan sebarang sokongan yang boleh dipercayai. Ini merupakan rayuan pendakwaraya terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan:

(1) Tindakan-tindakan dan tingkah laku yang diambil oleh M secara

keseluruhan tidak membuatnya seorang rakan subahat. Dia merupakan pemandu lori yang membawa barang-barang tersebut dan oleh itu hanyalah sekadar pemerhati yang mana peranannya dalam seluruh kejadian ini adalah fakta bahawa permintaan telah dibuat terhadapnya, yang dengan segera telah disampaikan kepada Azni. Tambahan, M tidak mengambil bahagian dalam mana-mana kesalahan dan keterangannya tidak termasuk dalam kelas orang-orang yang paling tidak pun saksi-saksi yang tidak boleh dipercayai dan yang mana keterangannya memerlukan sokongan. Dalam keadaan ini, hakim mahkamah sesyen berhak untuk mengambil tindakan atas keterangannya tanpa memerlukan sebarang sokongan (lihat perenggan 7–8).

(2) Keterangan Azni bahawa kad pengenalannya telah dirampas dan ancaman telah dibuat terhadap keluarganya semasa dia sedang mengumpul bayaran pertama sebanyak RM3,000 membuktikan bahawa dia bertindak di bawah tekanan. Adalah menjadi undang-undang tetap bahawa seorang saksi yang mengambil bahagian dalam satu kesalahan di bawah tekanan tidak dianggap sebagai seorang yang bersubahat. Oleh itu, keterangan Azni tidak memerlukan sokongan. Dalam mana-mana kes, sekiranya ia memerlukannya, maka keterangan Azni telah disokong dengan secukupnya. Keterangan M, keterangan pegawai BPR yang terdengar panggilan telefon daripada responden-responden di BPR meminta bayaran untuk baki daripada RM10,000 dan keterangan pegawai BPR lain yang menyaksikan Azni menyerahkan nota RM1,000 yang ditanda kepada responden pertama adalah keterangan sokongan yang lebih dan luas. Kehadiran responden pertama dan kedua di pejabat pos juga mengesahkan rancangan yang telah diatur di antara responden-responden dan Azni untuk berjumpa dengan mereka di sana. Keterangan tersebut secara keseluruhan pada penutup seluruh kes membuktikan keempat-empat tuduhan terhadap responden-responden adalah melampaui keraguan yang munasabah (lihat perenggan 9–12).]

Notes

For cases on corruptly receiving gratification, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 97–100.

For cases on credibility of, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2750–2779.

Cases referred to

Chao Chong & Ors v PP [1960] MLJ 238, CA (refd)
Daimon bin Banda v PP [1953] MLJ 23, CA (refd)
Mahadeo v Rex [1936] 2 All ER 813, PC (refd)
Rattan Singh v PP [1971] 1 MLJ 162, HC (refd)
Soosay Dass v PP [1951] MLJ 57, HC (refd)
Srinivas Mall v Emperor AIR 1947 PC 135, PC (refd)

Legislation referred to

Evidence Act 1950 s 133
Penal Code ss 34, 94
Prevention of Corruption Act 1961 s 18

Appeal from: Criminal Application MT(2) 42–8 of 2003, 42–16 of 200 and 42–17 of 2002 (High Court, Johor Bahru)

Azlina bt Rasdi (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Rosli Kamaruddin (Rosli Kamaruddin & Co) for the first respondent.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the second respondent.
Norah binti Abu Bakar (Azmi Norah & Associates) for the third respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This is the public prosecutor's appeal against the decision of the High Court at Johor Bahru reversing the conviction entered against the respondents by the sessions court. The background to this appeal is as follows.

[3] The two respondents before us and one Mohd Aniza Abu Bakar (now deceased) were charged with offences under the Prevention of Corruption Act 1961 ('the Act'). There were four charges in all. In the first charge, the accused persons (for that is what we will call the 'instant respondents' and 'the deceased accused') were alleged to have solicited the sum of RM3,000 from PW3 ('Mageswaran') in consideration of not taking action against him. This offence is said to have taken place on 26 November 1997 at about 1.30pm at the Customs Complex, Tanjung Puteri, Johor Bahru. In the second charge the three accused are alleged to have solicited a sum of RM10,000 from PW6 ('Mohamad Azni bin Abdul Ghani') in order not to take action against him for failing to declare goods entering Malaysia from Singapore. It is alleged that this second offence occurred on 26 November 1997 between 2.30pm–4.30pm at the aforesaid complex. The third charge alleges that on the same date and time specified in the second charge the accused received a bribe of RM3,000 from PW6 in consideration of not taking action against PW7 for his failure to declare dutiable goods upon their entry to Malaysia. The fourth charge alleged that on the next date ie on 27 November 1997 the accused received gratification of RM1,000 from PW6 for the same consideration as set out in the third charge.

[4] The prosecution case as unfolded to the court is as follows. PW6 is a Singaporean. On the date and time in question as set out in the first charge a lorry carrying his goods driven by PW3 arrived at the Customs complex at

Tanjung Puteri Johor Bahru. PW3 was accosted by the three accused who alleged that the lorry in question was carrying dutiable goods that had not been declared. According to PW3, whose evidence was accepted by the sessions court, a demand was made by the accused for a sum of RM3,000 to overlook the non-declaration. PW3 did not have the money and he informed the accused that the goods belonged to PW6 whom he contacted and requested to come to the Customs Complex. PW6 arrived at about 2.30pm at the scene. He was accompanied by his nine year old son Fadhli ('PW1') who was 13 years of age when he gave evidence at the trial. The three accused invited PW6 to accompany them to the canteen. PW3 was also present. At the canteen the three accused demanded a sum of RM10,000. PW6 did not have the money with him and said that he would pay only RM3,000. He assured the accused that he would raise the money the following day. The accused then took possession of PW6's identification card ('P11') as security to enforce his promise. According to PW6, later the same day, he paid a sum of RM3,000 to the third accused who was seated in a white 'Kancil' motorcar. This payment formed the subject matter of the third charge.

[5] The next day PW6 proceeded to the office of the Anti-Corruption Agency at Johor Bahru. While he was there he received two phone calls on his mobile telephone demanding the balance sum of RM7,000. It is important to note that one of the calls received by PW6 was in fact overheard by an Anti-Corruption Officer PW7 who made a brief note of the conversation.

[6] The next event of importance is a meeting that took place at 9.15pm on 27 November 1997 in front of Johor Bahru Post Office. PW6 and another Anti-Corruption Agency officer PW8 who accompanied him were present. Also present were the first and second accused. PW8 saw PW6 hand a marked RM1,000 note to the first accused. At about that time the third accused appeared from behind saying that he was not satisfied. Upon a prearranged signal being given the Anti-Corruption Agency officers waiting in ambush surrounded the first and second accused and arrested them. Later the third accused surrendered himself to the Anti-Corruption Agency. This, then, is the case for the prosecution

[7] Acting upon this evidence, the learned sessions judge convicted all the three accused on all the four charges and sentenced them accordingly. The accused being dissatisfied with that decision appealed to the High Court Johor Bahru which allowed the appeal and quashed the convictions. The main ground given by the learned High Court judge for reversing the sessions court was that there had not been a proper evaluation of the evidence of PW3 and PW6. He considered these witnesses to be accomplices and further held that the sessions court had misdirected itself in acting upon their testimony in the

absence of any credible corroboration. The learned deputy has argued that the intervention by the High Court was in error. We think there is merit in her complaint.

[8] In the first place, PW3 whom the learned High Court judge treated as an accomplice was not an accomplice at all. He was not interested in the goods which were said to be dutiable and undeclared. He was merely the driver of the lorry in which the goods were carried. He had no interest in the subject matter in the discussion that took place in the canteen. He was there merely as an observer. His only role in the whole incident was the fact that a demand had been made of him which he promptly conveyed to PW6. His acts and conduct taken as whole does not render him an accomplice. In arriving at this conclusion we are guided by the following passage in the judgment of the Malayan Court of Appeal in *Chao Chong & Ors v Public Prosecutor* [1960] MLJ 238 at p 239:

> It is true that by reason of s 94 of the Penal Code duress is not a defence to a charge of murder, although in at least one case an Indian Court has held that it is a defence to a charge of abetment of murder (see *Umadasi Dasi v Emperor* 1924 Cal 1031 at p 1033). The true question, however, was not the technical one of whether the witness could have been convicted for his participation in the offence if he had been prosecuted. The true question was whether, having regard to his participation in the offence and having regard to all the circumstances of the case, his evidence was to be regarded with suspicion and as possibly so tainted as to invite if not to demand corroboration before it was accepted. …

[9] Now applied that here. PW3 did not participate in any offence. Further, having regard to all the circumstances of this case, it is not reasonable to regard his evidence with suspicion. We would also add that PW3 did not fall within that class of persons who are at best not reliable witnesses and whose evidence calls for corroboration, see *Mahadeo v Rex* [1936] 2 All ER 813 at p 818. For these reasons we are in agreement with the approach adopted by the learned sessions judge to PW3's evidence. She was certainly entitled to act upon it without requiring any corroboration at all.

[10] As for PW6, it is plain that he was acting under duress when he negotiated with the accused and when he went about raising the first payment of RM3,000. It is in evidence that threats had been made against his family. His identity card had been seized. In these circumstances, it cannot be reasonably said that his conduct when taken as a whole amounted to what could be described as 'infamous conduct', an expression used by the decided cases to take a witness out of the protection of the statute namely s 18 of the Act, see *Daimon bin Banda v Public Prosecutor* [1953] MLJ 23, *Soosay Dass v Public Prosecutor* [1951] MLJ 57, *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162.

[11] Further, in *Srinivas Mall v Emperor* AIR 1947 PC 135 it was held that a witness who participated in an offence under the duress ought not to be treated as an accomplice. Lord Du Parcq said at p 139:

> Finally, it was urged that reliance had been placed on the uncorroborated evidence of accomplices. Section 133 Evidence Act, expressly provides that 'an accomplice shall be competent witness against an accused person' and that 'a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice'. No doubt the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must however vary according to the extent and nature of the complicity: sometimes, as was said by Sir John Beaumont CJ in *Kamal Khan v Emperor* AIR 1935 Bom 230, the accomplice is 'not a willing participant in the offence but a victim of it'. There is ground for saying that the accomplices in this case acted under a form of pressure which it would have required some firmness to resist.

We would therefore, at the risk of repetition, conclude that PW6's evidence did not require corroboration.

[12] Even if it did, ample corroboration is available in the instant case. First, there was the evidence of PW3, himself an impeccable witness. Second, there is the evidence of PW7 who overheard the telephone conversation in respect of the call received by PW6 at the office of the Anti-Corruption Agency. Third, there is the evidence of PW8 who saw PW6 hand the marked RM1,000 note to the first accused. No doubt that note was never found but that is irrelevant. What the first accused did with it was for him to explain. All the prosecution was required to do was to present credible corroborative evidence that the note was received by him. That it did. Fourth, there is the presence of the first and second accused at the post office which confirms the pre-arranged plan to meet them there.

[13] Viewing the evidence as a whole there is no question that the prosecution had, at the close of the whole case, proved the four charges against the accused beyond a reasonable doubt. It is true that s 34 of the Penal Code had not been invoked in this case against these accused. But the point now taken before us for the instant respondent was never taken at the trial or at the intermediate appeal. Nevertheless out of abundant caution we would observe that the prosecution had on the totality of the evidence established a joint enterprise among the three accused to commit the offence with which they were charged. Without rehearsing the facts in their entirety, we would refer the following points in the evidence which support the inference that the accused committed jointly. In the first place, the accused were all present when the demand was made of PW3. In the second place, they were all present at the canteen where the conversation took place. The mere fact that one of them chose to receive the RM3,000 and two of them chose to be present at the post

office does not detract from the inference that they were acting together in their joint enterprise namely to demand and to obtain a gratification.

[14] In supporting the judgment of the High Court, learned counsel for the instant respondents argued that the presence of his clients at the post office and other ancillary facts had been sufficiently explained by the accused when making their defence. However, it is to be observed that the major portion of the matters alleged against PW6 was never put to him when he gave evidence. In short the defence story had not been put to the prosecution during its case. It therefore comes as no surprise that the learned sessions judge treated the defence story as a recent invention.

[15] Having read and re-read the record provided to us and having scrutinised the evidence with much anxiety we are entirely satisfied that a reasonable tribunal armed with the facts of this case and properly directing itself would have arrived at the same conclusion as the learned sessions judge.

[16] For the reasons already given, we are of the view that this appeal should be allowed. We set aside the orders of acquittal entered by the High Court. The convictions entered and the sentences passed by the sessions court are hereby restored. The respondents shall forthwith be taken into custody and sent to a lawful place of imprisonment.

[17] Before we conclude, we would add that in view of the demise of the third accused, the public prosecutor's appeal against him abates.

Appeal allowed.

Reported by Kohila Nesan